

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,440

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision of the Department of Social Welfare denying her request for Medicaid coverage of a gingivectomy (resectioning of the gums) needed to halt the progression of periodontal disease

FINDINGS OF FACT

The parties have stipulated to the following findings of fact:

A. Based on the letters submitted in this matter by Theodore A. Ruel, M.D. of The Hitchcock Clinic - Keene, Keene, New Hampshire dated November 7, 1994, April 13, 1995 and May 3, 1995 and patient records provided by the Hitchcock Clinic and Dr. Ruel dated September 15, 1994, October 18, 1994, November 7, 1994, November 23, 1994, January 10, 1995, and April 4, 1995, and supplied references to the following medical authorities: Principles of Neurology, 5th Edition (19xx); the Physicians' Desk Reference, 49th Edition (1982); the Merck Manual of Diagnosis & Therapy, 14th Edition (1982); Stedman's Medical Dictionary, 24th Edition (1982) of which the Hearing Officer is requested to take judicial notice, and the record, the parties herein agree to the following facts:

1. Paragraph A is hereby incorporated by reference.
2. Petitioner, age 28, is diagnosed with mental retardation and seizure disorder.
3. Petitioner is a recipient of Supplemental Security Income (SSI) and Vermont Medicaid benefits.
4. Petitioner is prescribed Dilantin, 100 mgs. qid., to treat her seizure disorder.
5. Dilantin (phenytoin sodium) is an antiepileptic drug. [\(1\)](#)

6. Dilantin (phenytoin) is medically appropriate to treat petitioner's seizure disorder.
7. Prescription of another anti-convulsant medication is not medically appropriate to treat petitioner's seizure disorder.
8. Petitioner was prescribed Dilantin beginning on September 15, 1994 and continues to be prescribed 100 mgs. qid.
9. Prolonged use of phenytoin may result in the development of gingival hyperplasia.⁽²⁾
10. Gingival hyperplasia is a swelling of the gingiva due to cellular proliferation.⁽³⁾
11. Gingival hyperplasia may cause the gums to bleed, leave the gums susceptible to infection, and lead to loss of teeth.
12. Petitioner's gums bleed when her teeth are brushed.
13. Petitioner is diagnosed with gingival hyperplasia as a result of prolonged use of phenytoin and has been prescribed gingivectomy to treat the condition.
14. Gingivectomy is defined as gum resection; surgical resection of unsupported gingival tissue.⁽⁴⁾
15. On January 4, 1995, the Vermont Medicaid Division denied petitioner's request for prior authorization of gingivectomy stating it is a "non-covered adult service."
16. Vermont Medicaid coverage includes dental services to recipients of all ages.
17. Vermont Medicaid coverage limits the provision of periodontal care and periodontal surgery to recipients age 21 and older.
18. Periodontal is defined to mean around a tooth.⁽⁵⁾

ORDER

The decision of the Department is reversed.

REASONS

The Department argues that the following regulation acts as an absolute prohibition on paying for periodontal surgery (a gingivectomy) even for the purpose of limiting the progression of the petitioner's gum disease, gingival hyperplasia:

Effective January 1, 1989, coverage of dental services is extended to recipients age 21 and older. The scope of the program includes emergency dental care for relief of pain, bleeding and infection, selected preventive and restorative procedures rendered to limit disease progression, and necessary diagnostic and consultative services.

Covered services include:

- o Oral examinations - including oral cancer screenings
- o Diagnostic care services- radiography and related testing
- o Preventive/Restorative care - limited to oral prophylaxis, root planing and scaling, amalgam and composite restorations, and placement of prefabricated crowns.
- o Endodontia - not to exceed three teeth treated per person
- o Oral Surgery - all necessary surgery for tooth removal, and palliative treatment, such as abscess drainage. Third molar surgery will initially require authorization prior to treatment.

Rehabilitative, cosmetic, or elective procedures are not covered. Services not covered include:

- o Cosmetic dentistry
- o Bonding
- o Sealants
- o Periodontal surgery
- o Non-surgical, comprehensive/periodontal care
- o Orthodontia
- o Crown and bridge
- o Dentures (full or partial)
- o Elective care

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M621

This regulation has been interpreted by the Board in its prior decisions concerning requests for dentures. See Fair Hearings No. 10,379, 11,207, 11,625 and 12,180. In each of those decisions, but most explicitly in Fair Hearing No. 12,180, the Board has ruled that the plain meaning of that section is to impose an absolute prohibition on dental procedures if they are provided solely for "rehabilitative, cosmetic, or elective reasons." Thus, the items found in the listing following the heading of "rehabilitative, cosmetic and elective procedures" could be paid for if they were "medically necessary to treat another illness or injury which is covered by Medicaid". Fair Hearing No. 12,180.

The petitioner argues that the periodontal surgery she seeks is a necessary part of her treatment for seizures. Strictly speaking, that is not accurate as the presence or absence of seizures in the petitioner is not dependent upon her dental health. However, as a side-effect of her seizure medication, the petitioner has developed a progressive disease of the gums which could lead to infection, pain and even more serious bleeding than the petitioner now experiences.

M621 itself states that dental services can be obtained to limit disease progression. While the regulation states that only selected preventive and restorative procedures are covered for that purpose, the regulation does not list which procedures have been "selected." All that exists in the statute is a listing of some generally covered services. There is nothing in the regulatory language which indicates that the list is exhaustive or all inclusive or even that it refers to procedures related to limiting disease progression.

The limitation of disease progression is an expressly covered service under the dental care regulation. There is nothing in the regulation at M621 which would prohibit the use of periodontal surgery to achieve that purpose, although the Department would interpret the prohibition under the rehabilitative and cosmetic section as creating a blanket prohibition on payment of periodontal surgery for any reason. The Department's interpretation defies the plain meaning of the regulation. Moreover, if some ambiguity did exist in the regulation, the interpretation urged by the Department runs afoul of the federal statute requiring state plans to adopt "reasonable standards" consistent with objectives of the Act. 42 U.S.C. § 1396a(a)(17). More specifically, that interpretation would violate the federal regulation prohibiting discriminatory and arbitrary limitations of the "amount, duration and scope" of services provided based on the diagnosis and procedure involved. 42 C.F.R. § 440.230(c).⁽⁶⁾

Under federal statute and regulation, a state is not required to provide dental services. It is further allowed to restrict whatever services it does choose to provide what is medically necessary and what the state can afford (utilization control procedures). 42 U.S.C. § 440.230(d). For example, in Vermont, the state has chosen to provide dental services to alleviate emergency pain, bleeding and infection; to limit the progression of disease; and for diagnostic and consultative reasons. The state could further restrict services it provides to limit the progression of disease to what is medically necessary and to what it can afford. However, if it chooses to do so, it must make it very clear in the regulation why some procedures will be paid for and others not. If it fails to do so, its regulation may be attacked for arbitrariness and unwarranted discrimination based on diagnosis and treatment. See Kirk v. Dunning, P34,842 CCH Medicare/Medicaid Guide 9208 (1985) Nebraska Supreme Court, July 1985; Weaver v. Reagan, 886 F2d 194 (8th Cir. 1989); Ellis v. Patterson, 859 F. 2d 52 (8th Cir. 1988); and Simpson v. Wilson, 480 F. Supp. 97 (D. Vt. 1979)

If the Vermont regulation were interpreted as allowing oral surgery to limit disease progression but as not allowing periodontal surgery to limit disease progression, the regulation would have to fail because it contains no explanation as to why some treatment for progressive diseases might be excluded from coverage.⁽⁷⁾ Interpreting this regulation in accordance with the plain language and prior Board precedent avoids this pitfall and carries out the clearly stated intention of the regulation to limit disease progression.

As medically necessary preventive procedures to limit disease progression are allowed under the Department's regulation, it was error to deny the petitioner's request for coverage for her gingivectomy.

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1. Physicians' Desk Reference, 49th Edition, 1832 (19xx).
 2. Physicians' Desk Reference, 49th Edition, 1832, 1833, (1995); The Merck Manual of Diagnosis & Therapy, 14th Edition, 2105 (1982).
 3. Stedman's Medical Dictionary, 24th Edition, 675 (1982).
 4. Stedman's Medical Dictionary, 24th Edition, 585 (1982).
 5. Stedman's Medical Dictionary, 24th Edition, 1057 (1982).
 6. Sufficiency of amount, duration, and scope.
 - (a) The plan must specify the amount, duration, and scope of each service that it provides for--
 - (1) The categorically needy; and
 - (2) Each covered group of medically needy.
 - (b) Each service must be sufficient if amount, duration, and scope to reasonably achieve its purpose.
 - (c) The Medicaid agency may not arbitrarily deny or reduce the amount duration, or scope of a required service under §§440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.
 - (d) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.
- 42 C.F.R. § 440.230
7. The Department's argument that the state plan was approved by HCFA is not persuasive evidence that the particular regulatory requirement of amount, duration and scope was actually met.